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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1107

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI.

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INDEX TO APPENDICES

Page

Appendix A—Opinion Below A-1

Appendix B—Judgments Below B-1

1. Judgment of Affirmance B-1
2. Order Denying Rehearing B-2

Appendix C—1952 Proclamation Reserving Devil's Hole C-1

Appendix D—Statutes Involved D-1

1. Federal Statutes
   - (a) 1906 Act for Protection of American Antiquities D-1
   - (b) Desert Land Acts D-2
   - (c) Pertinent Portion of Endangered Species Legislation D-5
   - (d) Act Creating the National Park Service D-6
2. State Statutes
   - (a) Nevada Water Code (NRS ch. 533)....D-7
   - (b) Nevada Underground Water Act (NRS ch. 534) D-7

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APPENDIX A.

Opinion of the United States Court of Appeals, for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor. No. 74-1690.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. No. 74-2186.

OPINION

Appeal from the United States District Court for the District of Nevada.

Before: CARTER and CHOY, Circuit Judges, and SOLOMON,* District Judge.

SOLOMON, Judge:

Pupfish (cyprinodon diabolis) live in Devil's Hole, in the Death Valley National Monument in Nevada. They are a unique and endangered species. In an action filed by the United States (Government) to protect these fish, the district court limited the amount of water which the owners of a nearby cattle ranch may pump. The Cappaerts, owners of the ranch, and the State of Nevada, which intervened on the side of the Cappaerts, appeal.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The Cappaerts' ranch consists of 12,000 acres, of which 4,000 acres are in cultivation. The ranch, which represents an investment of more than 7 million dollars, has an annual payroll of more than $340,000 and employs more than 80 people. Between 1700 and 1800 head of cattle are fed on the ranch.

The Cappaerts drilled wells and pump groundwater[1] on their land for irrigation. Devil's Hole, a part of the Death Valley National Monument, is located within three miles of several wells on the ranch. Devil's Hole consists of a 40-acre tract in which there is a deep limestone cavern. At the bottom of this cavern there is a pool about 65 feet long, 10 feet wide, and more than 200 feet deep. There are steep rock walls on three sides of the pool, but on the fourth side there is a sloping rock shelf on which algae grows. This pool is part of the 4,500 square mile groundwater system from which the Cappaerts pump their water.

The Devil's Hole pupfish live in this pool. These pupfish evolved after the Death Valley Lake System dried up isolating this species of fish from its ancestral stock. The pupfish population varies from 200 in the winter to 800 after spawning in the spring and depends for its survival on the sloping rock shelf which provides food and a spawning ground. The Devil's Hole pupfish are less than one inch long and do not exist anywhere else in the world. They have been designated an endangered species under the Endangered Species Act of 1973, 16 U.S.C. § 1533 (1974), 50 C.F.R. § 17.

The water level in the pool is measured from a copper washer which the U.S. Geological Survey placed on

[1]In this opinion "groundwater" will be used synonymously with "underground water".

the shelf in 1962. Between 1962 and 1968 the average water level was 1.2 feet below the marker. In 1968, after the Cappaerts began to pump, the summer water level[2] steadily decreased: in 1970 to 3.17 feet below the marker; in 1971 to 3.48 feet and in 1972 to 3.9 feet. At these water levels large areas of the critical rock shelf are exposed. At 3.6 feet below the marker, 42 per cent of the shelf is exposed, and at 3.7 feet the exposure increases to 55 per cent. The shelf exposure decreases the algae production and limits the spawning area which in turn reduces the Devil's Hole pupfish's chance to survive.

On June 5, 1973, following a number of hearings, the court granted the Government's motion for a preliminary injunction. This injunction required that pumping on the Cappaert's ranch be limited so that the mean water level of 3.0 feet below the copper washer be attained within 90 days. The court also appointed a special master to control the pumping of other wells in order to reach and maintain this water level.

Among the extensive findings entered by the District Court were the following:

> "9. Through the Presidential Proclamation of January 17, 1952, and its publication in the Federal Register on January 23, 1952 (17 Fed. Reg. 691), the unappropriated waters in, on, under and appurtenant to Devil's Hole were withdrawn from private appropriation as against the United States and reserved to the extent necessary for the requirements and purposes of the said reservation."

[2]The Cappaerts pump water only from March to October. During the rest of the year the water level is higher.

"The purposes of the reservation of Devil's Hole as part of Death Valley National Monument includes the preservation of the pool of water and the preservation of the Devil's Hole pupfish (Cyprinodon diabolis) which live therein."

"14. The natural rock shelf and rubble thereon on which the Devil's Hole pupfish depend for feeding, reproduction and, hence their survival, is nearly 100% covered with water when there is a mean water level of 3.0 feet below the copper washer."

"16. The defendants' pumping of groundwater from wells known as Nos. 1, 2, 3, 4, 5 and 6, and 16 and 17, has drawn water from the springs and underground sources which comprise the supply for Devil's Hole. Because the defendants' wells and Devil's Hole are hydraulically connected, defendants' pumping has caused the water level in Devil's Hole to drop."

"24. In order to maintain a viable continuous population of Devil's Hole pupfish, the water level in Devil's Hole must be maintained above the natural rock shelf and the rubble thereon, which is a minimum of not less than 3.0 feet below the copper washer."

"25. If the water level at Devil's Hole drops below 3.0 feet below the copper washer, the survival of the Devil's Hole pupfish will be threatened, that is, the time of their becoming extinct in the natural evolutionary order will be accelerated."

Both the Cappaerts and the State of Nevada appealed. The Cappaerts also filed motions to modify, pending appeal, the preliminary injunction to permit them to

pump down to the 3.7 feet below the copper washer. Pending appeal, this Court permitted the Cappaerts to pump so long as the water level did not go lower than 3.3 feet below the copper washer.

On January 17, 1952, President Truman, by Presidential Proclamation 2961, withdrew Devil's Hole from the public domain and made it part of the Death Valley National Monument. U.S. Code Cong. & Adm. News, 82d Cong., 2d Sess., Vol. 1 at 964 (1952); 17 Fed. Reg. 691. The Proclamation was issued under the Act for the Preservation of American Antiquities, 16 U.S.C. § 431 (1974), which authorizes the President to declare ". . . objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ."

The Government contends that the Proclamation, with its express reservation of the Devil's Hole pool and the surrounding land from the public domain, contains an *implied* reservation of enough groundwater to assure preservation of the pupfish in that pool.

The implied reservation of water doctrine originated in *Winters v. United States,* 207 U.S. 564 (1908).[3] The Court in *Winters* held that private landowners could not impair Indian rights in a river which formed one boundary of a reservation, even though the Congressional grant of the land to the Indians had not mentioned water rights. The land reserved for the In-

[3]It was established before *Winters* that the Federal Government has the power to reserve waters which are needed for federal lands and to exempt those waters from appropriation under states laws. *United States v. The Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703, 706 (1899); *United States v. Winans,* 198 U.S. 371, 383 (1905). In those cases, however, the Government had expressly dealt with water rights.

dians was arid. The Court held that a grant of water rights must be implied because Congress intended by the grant of land to encourage the Indians to become farmers.

In *Arizona v. California,* 373 U.S. 546, 601 (1963), the Supreme Court extended the reservation doctrine of *Winters* to include waters reserved for federal lands which had been set aside for recreation, wildlife, or forests. This was reaffirmed and extended in *United States v. District Court for Eagle County,* 401 U.S. 520, 522-23 (1971). There the Court held that the Federal Government's authority "to reserve waters for the use and benefit of federally reserved lands . . ." extended to "any federal enclave."

The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water rights, the reservation of water doctrine is not so limited.

Two cases in the Ninth Circuit approved the application of the reservation of groundwater when it clearly appeared that water was needed to accomplish the purpose of the reservation. *Nevada ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), *aff'd on other grounds,* 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.,* 286 F.Supp. 383 (D. Mont. 1968).

In our view the United States may reserve not only surface water, but also underground water.[4]

---

[4]It is interesting that Nevada administers its water laws so as to provide that rights to groundwater can be perfected just as readily as rights to surface water.

The Cappaerts assert that the 1952 Presidential Proclamation was intended to preserve only the Devil's Hole pool with its unique limestone formation and not to protect the pupfish, and that therefore there was no implied reservation of groundwater. We reject that argument.

The Proclamation added the Devil's Hole pool to the Death Valley National Monument after reciting:

> "WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region; and
>
> "WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection. . . ."

The fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952; that condition included the pool's unique inhabitants, the pupfish. The Proclamation referred to the significant contribution of the pupfish to the scientific importance of the Devil's Hole pool; it implicitly reserved enough groundwater to assure preservation of the pupfish. This conclusion is reinforced by the National Park Service Act, 16 U.S.C. § 1 (1974), which states that "the fundamental pur-

pose" of all national parks and monuments is ". . . to conserve the scenery . . . and the wild life therein . . . by such means as will leave them unimpaired for the enjoyment of future generations."

The Cappaerts contend that under Nevada law they have ownership rights to the underground water which can only be taken from them by eminent domain. They assert that the 1952 Presidential Proclamation attempted to reserve underground water which belonged to their predecessor in interest.

In 1890 and 1892, the State of Nevada by selection acquired fee simple title from the United States Government to the land now owned by the Cappaerts. The Desert Land Act of 1877, 43 U.S.C. § 321 (1964), as construed in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935), provides that a transfer of federal land out of the public domain after the date of the Act would not pass title to any unappropriated appurtenant water; water rights would be determined under the law of the state in which the land was located. Because water rights were severed from title in 1877, Nevada got no water rights in 1890 and 1892 when it acquired title to the Cappaerts' land. Therefore, the Cappaerts, as successors in interest, possess no water rights unless they or a predecessor acquired such rights under Nevada law.

The Cappaerts argue that Nevada has adopted the old common law doctrine, established in *Acton v. Blundell*, 12 M. & W. 324 (Exch. Chamber 1843), that a landowner has unlimited dominion over all waters beneath his property. This doctrine, the Cappaerts contend, establishes their water rights as a matter of Nevada law.

The Supreme Court of Nevada in *Jones v. Adams*, 19 Nev. 78, 6 P. 442 (1885), repealed that common law doctrine. The court adopted and applied the theory of prior appropriation[5] as the basis for determining water rights. The doctrine of prior appropriation was reaffirmed in *Reno Smelting, Milling & Reduction Works v. C. C. Stevenson*, 20 Nev. 269, 282, 21 P. 317 (1889).

In 1913[6] and 1939,[7] Nevada enacted statutes providing that, subject to existing rights, all waters in Nevada belong to the public and may be appropriated as provided by statute, and not otherwise. Because no one had previously appropriated water rights through beneficial use, there were no "existing waters" to water on the Cappaerts' land in 1939. Thereafter, water rights could only be acquired, as the statutes provided, by obtaining a permit from the state. N.R.S. 533.325.

The constitutionality of the basic principles of the Nevada Water Code was upheld in *Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F.Supp. 571

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[5]Under the doctrine of prior appropriation, the first person to possess by beneficial use water for domestic purposes, mining, agriculture, or manufacturing has vested and accrued rights to the water as against any later appropriators. The central principle of the doctrine is beneficial use of water, not land ownership. *Atchison v. Peterson*, 87 U.S. 507 (1874); Powell, Real Property, Vol. 5, ¶734, page 442.

[6]N.R.S. 533.030. Appropriation for beneficial use.

"1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise."

[7]N.R.S. 534.020.

"All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise."

(D. Nev. 1938). Such statutes which abolished common law water rights when the landowner had not made actual beneficial use of the water were held to be a valid exercise of the police power. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555 (9th Cir. 1934), *aff'd on other grounds*, 295 U.S. 142 (1935).

Here neither the Cappaerts nor their predecessors made actual beneficial use of water until 1968. Even if they had some common law claim, they had not established a vested property right in the water based on prior appropriations before Nevada declared that groundwater belonged to the public.

Finally, the Cappaerts contend the Government is estopped from enjoining them from the unrestricted use of their wells located more than one mile from Devil's Hole. In 1969, the Cappaerts and the Government entered into a land exchange. The Cappaerts received land within one mile of Devil's Hole under a patent granting them "all rights, privileges, immunities and appurtenances . . . subject to any vested and accrued water rights for mining, agriculture, manufacturing or other purposes. . . ." The Cappaerts have drilled wells and pumped water on this land.

The Cappaerts admit they had no oral understanding with the Government agents about the water pumping, and they further admit that these agents made no oral representation. The Cappaerts argue, however, that the Government knew at the time of the land exchange that water wells would be drilled, but that the Government specified only that no wells should be drilled within one mile of Devil's Hole. The Cappaerts say that they spent large sums of money in drilling the

wells and in changing their farming operations, relying on their justifiable belief that they could drill wells and pump water without limitation.

This contention lacks merit. Estoppel cannot be invoked against the Government under the facts of this case. The statement of Mr. Justice Black in *United States v. California*, 332 U.S. 19, 40 (1947), is particularly appropriate here.

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

The rule that estoppel may not be invoked against the Government in cases involving public lands is set out in the excellent opinion of Judge Barnes in *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965).

Even if the doctrine of estoppel were available against the Government, it could not be applied here because there were no misleading statements or conduct that would give rise to an estoppel between private parties. Here the Government is not asking the Cappaerts to stop pumping but only to limit pumping to the level at which the pupfish can survive.

The State of Nevada, as intervenor, has asserted additional grounds for reversal.

Nevada contends that the federal government is bound by state water laws, and that the rights which

the Government asserts here were not acquired in conformity with state law. Under the Nevada law in effect in 1952, water rights could only be perfected by the issuance of a permit by the State Engineer.

The Government asserts that its rights were established by the implied reservation in the Presidential Proclamation of 1952 and that the United States is not bound by state water laws when it reserves land from the public domain. We agree.

The Desert Land Act of 1877, *supra,* severed soil and water rights on "public lands" and provided that such water rights were to be acquired in the manner provided by the law of the state of location. *California-Oregon Power Co. v. Beaver Cement Co., supra* at 162. But state water laws do not apply to "reservations"—lands withdrawn from the public domain. *Federal Power Commission v. Oregon,* 349 U.S. 435, 444, 448 (1955).

We hold that the Proclamation of 1952, which withdrew the Devil's Hole pool from the public domain, implicitly reserved the waters necessary to sustain the pupfish and legally established the Government's rights as against any future appropriation.

Nevada next contends that the District Court did not have jurisdiction to adjudicate the water rights in this case. Nevada argues that the Government must exhaust state procedures for determining water rights before going to a federal court. There is no merit in this contention.

Nevada relies on the so-called McCarran Amendment, 43 U.S.C. § 666 (1964).[8] That statute waives

[8]"Suits for adjudication of water rights—Joinder of United States as defendant; costs

(This footnote is continued on next page)

the sovereign immunity of the United States in certain cases involving adjudication of water rights. The waiver enables states to adjudicate competing claims for water rights in certain cases in which the United States is one of the claimants.

The McCarran Amendment was enacted to waive sovereign immunity when the United States is a defendant in a state or federal action so that water rights may be fairly and fully adjudicated. Congress did not intend to limit the forums available to the United States as a plaintiff by narrowing federal court jurisdiction. In *United States v. Nevada et al.,* 412 U.S. 534, 538 (1973), the Supreme Court noted that the District Court had jurisdiction to hear a case brought by the United States involving competing claims to water rights.

Nevada also contends that even if the District Court had concurrent jurisdiction with the state courts, the doctrine of res judicata bars the Government from collaterally attacking the decision of a state administrative body—here the State Engineer.

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

Provided, That no judgment for costs shall be entered against the United States in any such suit.

Service of summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."

In April, 1970, the Cappaerts applied to the State Engineer for permits to use groundwater from several wells.[9] The United States was not a party to these proceedings, nor was it ever served with process. Nevertheless, employees of the National Park Service learned of the applications through a public notice. A field solicitor for the National Park Service protested the applications because extracting groundwater would lower the water level in the Devil's Hole pool and might endanger the pupfish.

At the hearing held before the State Engineer in December, 1970, the solicitor explained the geological and hydrological bases for the Government's concern. He asked that the Cappaerts' applications be denied or postponed pending further scientific studies. The solicitor did not raise the jurisdictional issue or any of the legal issues which the United States had the right to assert.

In August, 1971, the Government filed this action in District Court to enjoin the Cappaerts from infringing on the Government's water rights at Devil's Hole. Nevada contends that the State Engineer's decision is res judicata and this action is therefore barred. We disagree.

The State Engineer did not have the authority to adjudicate the water rights of the United States because the United States did not waive its sovereign immunity.

[9]Sections 534.050 and 534.080 of the Nevada Revised Statues both provide that rights to use groundwater must be obtained in compliance with Chapter 533. That chapter provides that a person who wishes to appropriate public water for his use must file an application with the State Engineer and must then publish notice of the application. N.R.S. 533.325 and 533.360. Interested persons may protest the application, and the application and protest may be considered at a hearing by the State Engineer. N.R.S. 533.365. The application may be refused if to grant it would be "detrimental to the public welfare". N.R.S. 533.370.

Nevada's reliance here on the McCarran Amendment[10] is misplaced. The McCarran Amendment was enacted to waive the sovereign immunity of the United States in cases in which the presence of the United States as a party was necessary to the full and fair adjudication of competing claims to water rights. The Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 618 (1963), interpreted that statute to waive sovereign immunity only in ". . . a case involving a *general* adjudication of 'all the rights of various owners on a given stream,' . . . ." *See State of California v. Rank*, 293 F.2d 340, 346 (9th Cir. 1961). The Senate Report on the bill which became the McCarran Amendment shows the type of adjudication which was contemplated by Congress. The Report contained the following excerpt from *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 447 (1916):

> ". . . All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights. . . ." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951).

The proceeding before the State Engineer of Nevada was not a "general adjudication". The United States was not required to appear and prove its water rights to prevent forfeiture of its claims; the water rights of the United States were not in issue. The United States appeared only to explain the factual basis on which it opposed the Cappaerts' applications.

Furthermore, the McCarran Amendment waives sovereign immunity only in cases in which the United States is a defendant and has been served with process.

[10]See Footnote 8, *supra*.

The United States was neither a defendant nor served with process in the proceedings before the State Engineer.

Even if the United States had waived its sovereign immunity, we are not bound to give res judicata effect to the decision of an administrative body in a case of this kind. As the court said in *Grose v. Cohen,* 406 F.2d 823, 824 (4th Cir. 1969):

> "*Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. . . . Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, . . . but practical reasons may exist for refusing to apply it, e.g., United States v. Stone & Downer Co., 274 U.S. 225 (1927). And in any event, when traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958)."

Although the State Engineer may have expertise in the administration of Nevada's water laws, there is no evidence that he is qualified to consider or decide the complex issues of federal law involved in this case. The State Engineer's decision is not entitled to res judicata effect in this action.

We affirm the decision of the District Court. The District Court held the water level should be maintained at 3.0 feet below the copper washer in order to preserve the pupfish in the Devil's Hole pool. Pending this appeal, we permitted the Cappaerts to pump as long as the water level did not go below 3.3 feet. We remand this case to the District Court to determine

whether, on the facts developed during the pendency of this appeal, the lower water level may be adequate to preserve the pupfish.

We direct the District Court to retain continuing jurisdiction so that it may promptly act if a change in water level is required to preserve and protect the pupfish in the Devil's Hole pool.

AFFIRMED and REMANDED.

APPENDIX B.

JUDGMENTS BELOW.

1. Judgment of Affirmance.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, et al. Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. Nos. 74-1690 & 74-2186, D.C. No. Civil LV 1687.

APPEAL from the United States District Court for the District of NEVADA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of NEVADA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is AFFIRMED AND REMANDED.

A True Copy
Attest 2/20/75
Emil E. Melfi, Jr., Clerk
By /s/ Ray Hewitt
Ray Hewitt, Senior Deputy

Filed and entered December 4, 1974.

2. Order Denying Rehearing.

United States Court of Appeals, for the Ninth Circuit.

Filed: January 31, 1975

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor. No. 74-1690.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. No. 74-2186.

ORDER

Before: CARTER and CHOY, Circuit Judges, and SOLOMON,* District Judge.

The panel voted to deny both the appellants' and the intervenor-appellant's petitions for rehearing. Judge Choy voted to reject the suggestions for a rehearing en banc, and Judges Carter and Solomon have recommended the rejection of these suggestions.

The full court was advised of the suggestions for an en banc rehearing. No judge has requested a vote on these suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for a rehearing en banc are rejected.

---

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C.

1952 Proclamation Reserving Devil's Hole.

Proclamation No. 2961, January 17, 1952 (66 Stat. c. 18, 17 Fed. Reg. 691) is as follows:

Addition of Devil's Hole, Nevada, to Death Valley National Monument—California and Nevada
By the President of the United States of America

A PROCLAMATION

WHEREAS by Proclamation No. 2028 of February 11, 1933 (47 Stat. 2554), certain lands in California known as Death Valley were set aside and reserved as the Death Valley National Monument for the preservation of the unusual features of scenic, scientific, and educational interest therein contained; and by Proclamation No. 2228 of March 26, 1937 (50 Stat. 1823), the said monument was enlarged by adding thereto certain contiguous lands in California and Nevada; and

WHEREAS there is located outside the boundaries of the said monument but in the vicinity thereof a forty-acre tract of public land in Nevada containing a remarkable underground pool known as Devil's Hole; and

WHEREAS the said pool is a unique subsurface remant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly striated limestone, while also owing its formation in part to fault action; and

WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert

fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region; and

WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, 34 Stat. 225 (16 U.S.C. 431), do proclaim that, subject to the provisions of the act of Congress approved June 13, 1933, 48 Stat. 139 (16 U. S. C. 447), and to all valid existing rights, the following-described tract of land in Nevada is hereby added to and reserved as a part of the Death Valley National Monument, as a detached unit thereof:

Mount Diablo Meridian, Nevada

T. 17 S., R. 50 E.,
sec. 36, SW ¼ SE ¼.

Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this addition to the said monument and not to locate or settle on any of the lands thereof.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of the lands hereby added to the said monument as provided in the

act of Congress entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (39 Stat. 535; 16 U. S. C. 1-3), and acts supplementary thereto or amendatory thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 17th day of January in the year of our Lord nineteen hundred and fifty-two, and of the Independence of the United States of America the one hundred and seventy-sixth.

HARRY S. TRUMAN

[Seal]

By the President:
Dean Acheson
Secretary of State

NOTE: The only legislation mentioned in the foregoing Proclamation that does not appear in Appendix D, immediately below, is the Act of June 13, 1933, c. 70, 48 Stat. 139, 16 U. S. C. §447. This measure simply extended the mining laws of the United States to the Death Valley National Monument.

APPENDIX D.

STATUTES INVOLVED.

1. Federal Statutes.

(a) *1906 Act for protection of American Antiquities.* Below is set out, as enacted, the Act of June 8, 1906, c. 3060, 34 Stat. 225. It has never been amended, and is now distributed in 16 U. S. C. §§431, 432, and 433.

CHAP. 3060—An Act For the preservation of American antiquities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

SEC. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects

to be protected: *Provided,* That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

SEC. 3. That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided,* That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

SEC. 4. That the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act.

Approved, June 8, 1906.

(b) *Desert Land Acts.* The Act of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), and March 3, 1877 (19 Stat. 377), as amended, now appear in pertinent part in 43 U. S. C. §§321, 323, and 661, and provide as follows:

§ 321. Entry right generally; extent of right to appropriate waters

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of 25 cents per acre—to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment to such officer of the additional sum of $1 per acre for a tract of land not ex-

ceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under sections 321-323, 325 and 327-329 of this title. However, in that entry one or more tracts may be included, and the tracts so entered need not be contiguous. The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres, and all the tracts entered by one person shall be sufficiently close to each other to be managed satisfactorily as an economic unit, as determined under rules and regulations issued by the Secretary of the Interior.

§ 323. Application to certain States

Sections 321-323, 325 and 327-329 of this title shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota.

§ 661. Appropriation of waters on public lands; rights-of-way for canals and ditches

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the

public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section. R.S. §§2339, 2340.

Historical Note

R.S. 2339 derived from Act July 26, 1866, c. 262, §9, 14 Stat. 253. R.S. 2340 derived from Act July 9, 1870, c. 235, §17, Stat. 218.

(c) *Pertinent Portion of Endangered Species Legislation.* As the text of the petition indicates, three Acts are in question: (i) Act of October 15, 1966, Pub. L. 89-669, 80 Stat. 926; (ii) Act of December 5, 1969, Pub. L. 91-135, 83 Stat. 275; and (iii) Act of December 28, 1973, Pub. L. 93-205, 87 Stat. 884.

By §12(d) of the 1969 Act, the first five sections thereof plus the first three sections of the 1966 Act, were thereafter to be cited as the "Endangered Species Conservation Act of 1969".

By §14 of the 1973 Act, short-titled the "Endangered Species Act of 1973", the "Endangered Species Conservation Act of 1969", constituted as above, was repealed.

This left untouched §4(i) of the 1966 Act, 80 Stat. at 929, 16 U. S. C. §668dd(i), which provides as follows:

> "Nothing in this Act shall constitute an express or implied claim on the part of the Federal Government as to exemption from State water laws."

The balance of the endangered species legislation still on the books to be found in 16 U. S. C. §§668dd, 668ee, and 1531-1543, is too long for quotation, and is moreover not pertinent to any of the issues presented by the petition.

(d) *Act Creating the National Park Service.* The pertinent portion of §1 of the Act of August 25, 1916, c. 408, 39 Stat. 535, as amended, is now 16 U. S. C. §1, as follows:

> **§ 1. Service created; director; other employees**
>
> There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

2. State Statutes.

(a) The 1913 Nevada Act for the Adjudication of Water Rights, &c., now ch. 533 of the Nevada Revised Statutes, provides in pertinent part as follows:

> *533.025 Water belongs to public.* The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public.
>
> *533.030 Appropriation for beneficial use.*
>
> 1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise.
>
> *533.035 Beneficial use: Basis, measure and limit of right to use.* Beneficial use shall be the basis, the measure and the limit of the right to the use of water.
>
> *533.050 Beneficial use of water declared a public use; eminent domain.* The beneficial use of water is hereby declared a public use, and any person may exercise the right of eminent domain to condemn all lands and other property or rights required for the construction, use and maintenance of any works for the lawful diversion, conveyance and storage of waters.

(b) The 1939 Nevada Act relating to Underground Waters, now ch. 534 of the Nevada Revised Statutes, provides in pertinent part as follows:

> *534.020 Underground waters belong to public; subject to appropriation for beneficial use; declaration of legislative intent.*
>
> 1. All underground waters within the boundaries of the state belong to the public, and subject

to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.

534.080 Appropriation of underground water for beneficial use from artesian or definable aquifer: Acquisition of rights under chapter 533 of NRS; orders to desist; dates of priority.

3. The date of priority of all appropriations of water from an underground source, mentioned in this section, is the date when application is made in proper form and filed in the office of the state engineer pursuant to the provisions of chapter 533 of NRS.

534.100 Recognition of existing water rights; classification of water in definable aquifer or percolating water by state engineer; adjudication of vested underground water rights.

1. Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913, and an underground water right on percolating water, the course and boundaries of which are incapable of determination, acquired prior to March 25, 1939. The distinction as to whether water is in a definable aquifer or whether it is percolating water, the course and boundaries of which are incapable of determination, is a matter to be determined by the state engineer.